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No. 06-985

Supreme Court, U.S.
FILED
MAR 21 2007
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IN THE

Supreme Court of the United States

LYNETTE M. PETRUSKA,

Petitioner,

v.

GANNON UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's failure to file her petition for writ of certiorari from the Third Circuit's October 3, 2006 order denying her petition for rehearing within ninety days is saved by the fact that the Third Circuit filed an Amended Order on October 18, 2006, reiterating verbatim the October 3, 2006 denial of rehearing, but correcting the administrative oversight in the original order by adding the notation that Judge Ambro would have granted rehearing by the court *en banc*?

2. Whether, in any event, in the absence of a conflict among the Circuit Courts regarding the ministerial exception, there is any compelling reason for this Court to grant certiorari to upset the principle that Title VII of the Civil Rights Act of 1964, as amended, may not be applied to regulate the relationship between religious employers and their "ministerial" employees?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Gannon University is a Pennsylvania not for profit (non-stock) corporation which has no parent company.

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STATUTES INVOLVED

28 U.S.C. § 2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

OBJECTION TO THE JURISDICTION OF THE COURT TO GRANT THE PETITION

On September 6, 2006, the Third Circuit Court of Appeals issued the decision Petitioner seeks to have this Court review. (Appendix to Petition ("App."), p. 1). Petitioner then filed a petition for rehearing, which the Third Circuit denied in a one-sentence Order dated October 3, 2006. (App., pp. 131-32). Because the October 3, 2006 Order had failed to note, in accordance with Third Circuit Internal Operating Procedure 9.5.8., that Judge Ambro would have granted rehearing by the court *en banc*, the Third Circuit, *sua sponte*, issued an October 18, 2006 Order repeating verbatim the first (and only) sentence of the October 3, 2006 Order, adding only a second sentence stating, "Judge Ambro would grant rehearing by the Court *en banc*." (App., pp. 127-30).

Petitioner filed her petition for writ of certiorari in this Court on January 16, 2007, one hundred five days after October 3, 2006. The petition filed by Petitioner is untimely; this Court therefore lacks jurisdiction to hear her appeal under 28 U.S.C. § 1254(c).

STATEMENT OF THE CASE

A. Facts

Respondent Gannon University ("Gannon") is a private, Catholic diocesan university located in Erie, Pennsylvania. Respondent Donald Trautman ("Trautman") is the Bishop of the Roman Catholic Diocese of Erie, and the Chairperson of Gannon's Board of Trustees. Respondent Antoine Garibaldi ("Garibaldi") is Gannon's President. Respondent Monsignor David Rubino ("Rubino") is a priest in the Roman Catholic Diocese of Erie, who formerly served as Gannon's President. Respondent Father Nicholas Rouch ("Rouch"), also a priest in the Roman Catholic Diocese of Erie, is Gannon's Vice President for Mission and Ministry.

Petitioner became Gannon's Chaplain in July of 1999, when Rubino was Gannon's President. Then, and at all times relevant to the matters she complains of in her suit, Petitioner was a member of the religious order of the Sisters of Saint Joseph. In July of 1999, the Chaplain reported to Gannon's President and was a member of the President's Staff, an advisory body. As Chaplain, Petitioner was the co-chair of Gannon's Catholic Identity Task Force. She also held prayer services and was traditionally involved in the planning of liturgical services. In the annual employment evaluation Petitioner attached as an exhibit to her First Amended Complaint, she noted as performance objectives for herself such things as "continue to develop strategies to increase participation in sacramental life of Gannon community," "increase involvement of Catholic Identity Task Force in promoting Catholic identity of university and discussions of Gannon's mission," and "continue to develop faculty and staff as partners in sacramental spiritual mission of

university." Petitioner also supervised campus ministry employees whose duties involved designing, developing and coordinating religious services, programs and pastoral counseling that pertains to advancing the faith, life, spiritual welfare and apostolic formation of the Gannon community.

In or around the summer of 2000, Gannon created the position of Vice President for Mission and Ministry, and Rouch was appointed fill the position. Garibaldi became President of Gannon in July of 2001. In August of 2002, Garibaldi informed Petitioner that, as part of a restructuring of Gannon's administration, the Chaplain would report to the Vice President for Mission and Ministry and would no longer be a member of the President's Staff. Garibaldi directed Petitioner to begin reporting to Rouch at that time.

After Garibaldi informed Petitioner in August, 2002 of the restructuring and directed her to begin reporting to Rouch, she refused to do so. Garibaldi announced the news of the restructuring to the Gannon community at the beginning of October, 2002. Petitioner continued to refuse to report to Rouch. On October 8, 2002, Garibaldi informed Petitioner that if she continued to refuse to report to Rouch, Gannon would take appropriate action. Believing she was about to be terminated, Petitioner submitted her resignation on October 14, 2002.

B. Proceedings Below

On March 11, 2004, Petitioner filed a five-count Complaint against Gannon, thirty-nine specifically named members of its Board of Trustees and "all other known and unknown members of Gannon's Board of Trustees during the tenure of its current Chairman", Trautman (the

"Respondent Trustees"), Gannon's current President, Garibaldi, Gannon's former President, Rubino, and Gannon's Vice President for Mission and Ministry, Rouch, claiming that she had been demoted and constructively discharged. Petitioner named Trautman, Rubino, Garibaldi and Rouch as defendants "in their individual and official capacities." On May 13, 2004, Petitioner filed a First Amended Complaint, in which she added an additional count, for a total of six counts asserted against the Respondents.

Count I of the First Amended Complaint purports to state a claim for gender discrimination against all of the Respondents in violation of Title VII; Count II purports to state a claim for unlawful retaliation against all of the Respondents in violation of Title VII; Count III purports to state a claim for Fraudulent Misrepresentation against Gannon, Rubino and Trautman; Count IV purports to state a claim for Civil Conspiracy against Trautman, Garibaldi and Rouch; Count V purports to state a claim for Breach of Contract against Gannon and Garibaldi; and Count VI purports to state a claim against Gannon and the Respondent Trustees for Negligent Supervision and Retention of Trautman as Chairperson of Gannon's Board, Garibaldi as President and Rouch as Vice President.

Gannon, the Respondent Trustees, and Trautman, Rubino, Garibaldi and Rouch, in their official capacities, moved to dismiss Petitioner's First Amended Complaint for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and/or failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6)). Trautman, Garibaldi, Rubino and Rouch, in their individual capacities, separately moved to dismiss for lack of subject matter jurisdiction. Following oral argument on the motions to dismiss, the

district court accepted and considered various factual allegations and documents Petitioner submitted in opposition to the motions to dismiss. In a December 27, 2004 Memorandum Opinion and Order the district court granted the motions to dismiss on the basis that the ministerial exception deprived the court of subject matter jurisdiction to hear Petitioner's claims.

Petitioner appealed the district court's decision to the Third Circuit Court of Appeals. On May 24, 2006, the Third Circuit issued an opinion, authored by the late Judge Becker and joined by Judge Nygaard, reversing the district court's dismissal of Petitioner's Title VII discrimination and retaliation claims (Counts I and II of the First Amended Complaint), as well as her civil conspiracy, breach of contract and negligent supervision and retention claims (Counts IV, V and VI) and affirming the dismissal of her fraudulent misrepresentation claim (Count III). Judge Smith dissented from the May 24, 2006 opinion. The Respondents jointly petitioned for rehearing. On June 20, 2006, the Third Circuit granted Respondents' petition for rehearing, *vacated* the May 24, 2006 opinion and judgment and referred the case to rehearing before a reconstituted panel. (App., pp. 133-34). On September 6, 2006, the Third Circuit issued a unanimous opinion, authored by Judge Smith, affirming the district court's dismissal of Petitioner's Title VII discrimination and retaliation claims (Counts I and II), as well as her civil conspiracy and negligent retention and supervision claims (Counts IV and VI) and reversing the dismissal of her fraudulent misrepresentation and breach of contract claims (Counts III and V). In the September 6th opinion, Judge Smith announced that the Third Circuit was joining seven other circuit courts in adopting the ministerial exception and holding that it applies "to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." *Petruska v. Gannon University*, 462 F.3d 294, 299 (3d Cir. 2006), (App., p. 4).

Petitioner filed a petition for rehearing from the September 6, 2006 opinion and judgment. The Third Circuit denied rehearing on October 3, 2006. (App., pp. 131-32). On October 18, 2006, the Third Circuit, *sua sponte*, issued an Amended order denying rehearing, correcting an administrative oversight that the October 3, 2006 Order failed to note that Judge Ambro would grant rehearing by the court *en banc*. (App., pp. 129-30).

REASONS FOR DENYING THE PETITION

The Petition Was Not Timely Filed, Therefore the Court Lacks Jurisdiction to Hear this Appeal.

A petition for a writ of certiorari intended to bring a judgment in a civil action before the Court for review must be filed within ninety days after the entry of the judgment, unless the time in which to do so is extended by a justice of the Court for good cause shown. 28 U.S.C. § 2101(c). This statutory requirement is reflected in Supreme Court Rule of Procedure 13.1:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States Court of Appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

The 90-day limit of 28 U.S.C. § 2101(c) is mandatory and jurisdictional; the Court has no authority to extend the time for filing except as Congress permits. *Missouri v. Jenkins*, 465 U.S. 33, 45 (1990). *See also Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 91

(1994) (Federal Election Commission had no independent authority to file a petition for a writ of certiorari and the Solicitor General's "after-the-fact" authorization did not relate back to the date of the FEC's timely, but unauthorized, filing of the petition, therefore, the Court dismissed the petition for want of jurisdiction).

Where a petition for rehearing has been timely filed in the circuit court of appeals, the Court treats such a petition as tolling the start of the period in which a petition for a writ of certiorari must be filed, until the circuit court denies rehearing or a new judgment is entered on rehearing. *Jenkins*, 465 U.S. at 45 (citing *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942)). That practice is reflected in this Court's Rule 13.3: "[I]f a petition for rehearing is timely filed in the lower court by any party, . . . the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing. . . ."

Petitioner asserts in her Statement of Jurisdiction that the Third Circuit denied her petition for rehearing on October 18, 2006. That statement is inaccurate and misleading. In fact, the Third Circuit denied her petition for rehearing on October 3, 2006. Although the Third Circuit did enter an Amended Order on October 18, 2006, that subsequent order merely corrected an administrative oversight in October 3rd Order – the failure to include the statement that Judge Ambro would have granted rehearing by the court *en banc*. The initial order of October 3, 2006 clearly held that Petitioner's application for rehearing had been denied. Nothing in the Amended Order of October 18, 2006 changed that denial, nor did it enlarge or contract any rights or duties conferred by the earlier order, or provide any incentive for further review not contained in the original order.

Petitioner filed her petition for a writ of certiorari one hundred five days after October 3, 2006, the date the Third Circuit initially denied her petition for rehearing. The question posed by Respondents in this case is whether the entry of the October 18, 2006 Amended Order extended the period for filing a petition for writ of certiorari by the fifteen days that elapsed between the two orders. Stated otherwise, the question is whether Petitioner's failure to file her petition for writ of certiorari within ninety days from the Third Circuit's October 3, 2006 order denying her petition for rehearing is saved by the fact that the Third Circuit filed an Amended Order on October 18, 2006, where that subsequent order did not change the substance of the initial order.[1]

In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), this Court squarely addressed the issue of when and how the entry of a second order by an appellate court regarding a prior decree or judgment of that court affects the time for filing a petition for certiorari. In *Minneapolis-Honeywell*, the Seventh Circuit Court of Appeals issued its initial decision on July 5, 1951, reversing part of a cease and desist order issued by the FTC. No petitions for rehearing were filed, but on August 21, 1951, the FTC filed a memorandum requesting that the court enter a decree consistent with the July 5th decision. On September 18, 1951, the court issued what it termed its "final decree", which repeated the provisions of the July 5th decision.

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1. January 16, 2007 was the ninetieth day after October 18, 2007. The ninetieth day after October 3, 2006 was January 1, 2007. The Court was closed on January 1, 2007. The Court was also closed on January 2, 2007 in observance of the National Day of Mourning for the death of former President Gerald R. Ford. Therefore, January 3, 2007 would have been the last date upon which a timely petition for a writ of certiorari from the Third Circuit's October 3, 2006 Order denying rehearing could have been filed.

The FTC filed a petition for certiorari on December 14, 1951, which this Court observed "was out of time unless the ninety day filing period began to run anew from the second judgment entered on September 18, 1951". *Id.* at 210. The Court explained the test to be applied in reaching the answer to that question:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does *not* toll the time within which review must be sought. *Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew.* The test is a practical one. *The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.*

Id. at 211-12 (emphasis added) (footnotes omitted).

The Court concluded that the Seventh Circuit's September 18th judgment did not meet this test — it simply "reiterated, without change, everything which had been decided on July 5." *Id.* at 212. The Court also rejected the FTC's argument that the Seventh Circuit's use of the word "final" in its September 18th judgment operated to extend the time for filing:

> [W]e think the question of whether the time for petitioning for certiorari was to be enlarged cannot turn on the adjective which the court below chose

> to use in the caption of its second judgment. Indeed, the judgment of July 5 was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals. It was neither 'tentative, informal nor incomplete.'

Id. at 212-13, (footnote omitted). Finally, the Court summarized the rationale underlying the test for determining whether a subsequent order tolls the time for filing a petition for certiorari:

> [W]e do mean to encourage applicants to this Court to take heed of another principle — the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. *Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.*

Id. at 213 (emphasis added)(footnote omitted). *See also Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942) (for the purpose of determining the finality required for review in this Court, the test is not whether under local rules of practice the judgment is denominated final, rather it is whether the record of the lower court shows that the order sought to be reviewed has in fact fully adjudicated rights and that the adjudication is not subject to further review; where the order is final in this sense, the time for applying to this Court runs from the date of the order since the object

of the statute [conferring jurisdiction] is to limit the applicant's time to three months from the date finality of the judgment for purposes of review is established. *Id.* at 268.).

Courts have consistently applied the *Minneapolis-Honeywell* rationale to determine timeliness in circumstances where serial decisions have been issued by a lower court. *See, e.g., Keith v. Truck Stops Corporation of America*, 909 F.2d 743 (3d Cir. 1990) (second judgment awarding prejudgment interest adding a significant amount to an earlier judgment was substantive and sufficient to produce a new judgment with a new time for appeal); *Kraft v. United States*, 85 F.3d 602 (Fed Cir. 1996) (revised judgment that corrected the amount of an award in tax refund suit did not constitute a new and significant adverse ruling against taxpayer that would extend the time to appeal).

In this matter, the Third Circuit denied Petitioner's petition for rehearing on October 3, 2006. Thereafter, the court *sua sponte* issued two October 18, 2006 Orders — one explaining the reason for the second, corrective order (App., pp. 127-28) and the October 18, 2006 Amended Order itself. (App., pp. 129-30). The text of the October 18, 2006 order regarding the denial of the petition for rehearing is identical to the October 3, 2006 order.

The finality of the Third Circuit's September 6, 2006 judgment was established on October 3, 2006 when the court denied rehearing. The October 3, 2006 Order was not tentative, informal or incomplete, and it put to rest the question whether the Court would grant rehearing. The October 18th Amended Order did not disturb or revise any legal rights and/or obligations that by the October 3rd Order "had been plainly and properly settled with finality." To the

contrary, the additional sentence in the October 18th Amended Order is immaterial to the issue whether the court would grant rehearing and it does not change any matter of substance or resolve any genuine ambiguity in the clear and unambiguous October 3rd Order. *Minneapolis-Honeywell, supra.*

The Third Circuit's October 18th Amended Order is a perfect example of "an event that occurred in the lower court" after it issued the October 3rd Order denying rehearing that is of no import to the matters to be dealt with on review. The Third Circuit simply corrected an administrative oversight by noting that Judge Ambro would have granted rehearing *en banc*. The statute that limits this Court's appellate jurisdiction, 28 U.S.C. § 2101(c), should not be applied to permit a tolling of its time limitations under circumstances such as these.

The Petitioner Has Not Articulated Any Compelling Reason To Grant Certiorari

It should be noted, also, that beyond the fatal procedural defect of Petitioner's untimely filing, there exists no compelling reason upon which certiorari should be granted. The Circuit Courts of Appeal that have addressed the question of the "ministerial exception" have consistently held that the First Amendment bars employment discrimination claims brought by ministerial employees against their religious employers. Under this jurisprudence, whether the exception applies turns on a factual determination of the employee's role in performing the spiritual and religious functions of the church. The Third Circuit adopted that same rationale in this case and applied it to reach a conclusion that is wholly consistent with the other Circuit Courts. The only potential "conflict" Petitioner can point the Court to on the ministerial

exception is the opinion of the late Judge Becker, which Petitioner presumptuously labels as "*Petruska I*," but which is, in fact, a nullity, having been *vacated* by the Third Circuit and replaced by the very decision Petitioner now seeks to challenge. The pages cited by Petitioner are not part of any bound volume, and are not even available electronically. The fact that "*Petruska I*" was vacated below by the Third Circuit itself is further evidence of the consistency of "ministerial exception" jurisprudence in the lower courts — an additional reason to deny the Petition, not a reason to grant it.

Petitioner aptly points out in her Petition that from the 1972 case of *McClure v. Salvation Army*, 460 F.2d 553, *cert. denied*, 409 U.S. (1972), generally acknowledged as the first to recognize and apply the ministerial exception, to as recently as five months ago (October of 2006) in *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir.), *cert denied*, 127 S. Ct. 190 (2006), this Court has consistently declined to grant certiorari on the question of the existence or scope of the ministerial exception. (Petition, p. 6 n.1). Since *Tomic*, both the Fifth and Sixth Circuit Courts of Appeal (*Boggan v. Mississippi Conference of the United Methodist Church*, Slip Copy, 2007 WL 412044 (5th Cir. 2007)(unpublished); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007)) have reaffirmed the ministerial exception. No significant legal developments have occurred in the five months since this Court denied certiorari in *Tomic* that would warrant granting certiorari in this case. For this reason alone, certiorari should be denied.

CONCLUSION

Petitioner clearly knew as of October 3, 2006 that the Third Circuit denied her petition for rehearing. Simply put, the Third Circuit's October 18th Amended Order "reiterated, without change, everything which had been decided" in its October 3rd Order. *Minneapolis-Honeywell, supra.* Therefore, this Court must conclude: (i) that the time for Petitioner to file a petition for writ of certiorari in this Court began to run on October 3, 2006; (ii) that the entry of the October 18, 2006 Amended Order did not extend the time for Petitioner to file her petition for certiorari; and (iii) that the petition she filed on January 16, 2007 must be dismissed as untimely.

Respectfully submitted,

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